



Toyota's nightmare

The role "pedal error" will likely play in Toyota SUA accident litigation

BY LAWRENCE R. BOOTH

Sudden Unintended Acceleration (SUA) accidents can sometimes simply be a case of "pedal error." It is clear that Toyota intends to blame drivers for hitting the accelerator pedal by accident in a vast majority of cases, whether the defense is justified or not.

In the simplest cases of SUA, the driver experiences a runaway vehicle on the highway which continues despite the fact that he has removed his foot from the gas pedal. Typically, the episode lasts a long time, and the driver takes long-term rational action, such as calling 911 on his cell phone or even trying to flag down other motorists or the highway patrol. This is probably not pedal error.

The much more difficult cases for the plaintiff, where the pedal error defense might very well apply, are usually short term and may involve a certain amount of panic. If indeed the case is clearly driver pedal error, then attempting to succeed in a products liability case may be a very uphill battle. The problem is to differentiate the real pedal error cases from the alleged pedal error cases.

Pedal error experts

It is obvious that any SUA case will require a well-qualified automobile engineer who has vast experience in automotive electronics. Because pedal error will always be claimed by the defense (whether the case is likely to be pedal error or not), these cases will also require a human factors expert, one who has experience in investigating pedal error, to counter the argument.

Defense pedal error claims

The history of runaway Toyota cars in recent months has been inevitably followed by a gracious statement on the part of Toyota that they are not trying to blame the driver but at the same time suggesting that no other explanation is plausible. There is a substantial amount of literature deleted on pedal error. Attorneys who represent plaintiffs claiming SUA in Toyotas must be prepared to deal with many of the following claims:

This is the third in a series of articles on the product-liability litigation against Toyota. In May, the Honorable James Selna in the Central district Federal Court, Santa Ana, announced the plaintiffs' steering committee. The committee includes many prominent California attorneys: co-chair Elizabeth J. Cabraser of San Francisco; Mark P. Robinson, Jr. of Newport Beach; Wylie Aitken of Santa Ana (liaison committee); Marc M. Seltzer, Los Angeles; Brian M. Panish, Los Angeles; Michael Louis Kelly, El Segundo; Frank M. Pitre, Burlingame; and Jerome L. Ringler, Los Angeles.

- **Age:** According to some studies, drivers in the 60-70 year-old age group had about six times more SUA incidents than their 20-30 year-old counterparts.
- **Experience with the accident vehicle:** Studies show that the driver's lack of experience with the particular vehicle involved in the accident, as opposed to overall driving experience, drives up the SUA statistics. These studies suggest that at least a quarter of the SUA cases occur in new cars with less than 2,000 miles and similar statistics apply to rental cars, car washes, parking garages and repair shops.
- **Accidents at the start of the driving cycle:** This will be a critical claimed factor, particularly in parking cases. The argument is that such situations offer a greater opportunity for the driver to be misaligned with respect to his usual driving position and therefore aim wrong at the pedals. The claim is that this can happen if the driver stops for some reason, or parks and especially if he exits the vehicle.
- **The driver's stature and general experience:** The defense will point out that certain studies may show that short women, very tall men and other examples of physical characteristics along with overall lack of experience drive up the incidents of SUA. If that is true, then how can you blame the accident on some defect in the car?

Basic questions in alleged pedal error cases

Studies with a driver simulator have shown direct evidence of drivers slipping off the brake onto the gas pedal or simply miss-

ing the brake altogether and hitting the accelerator. The trouble with these studies is that the driver, at least in a simulator, will almost immediately correct the mistake.

There have been studies which suggest a simple neurological, spinal or muscle variability which leads to errors in foot trajectory. Because going from the accelerator to the brake is automatic, it is argued that this variability factor may result in a lack of feedback to the driver that there has been a mistake. The driver may have a kind of tunnel vision and refuse to recognize his pedal error. Worse yet, he may engage in panic which causes perseverance such as continually trying to open the same locked door in a burning building.

Good news: the common sense rebuttal

It is extremely rare for drivers confronted with short-term SUA events to admit that they hit the wrong pedal. Fortunately, many jurors will rely on their common sense and reject the defense experts as engaging in mumbo jumbo. Because of the wide publicity given to the problems of SUA in Toyotas, it will be hard for the defense to find a jury pool which has not heard that a large number of these events were reported over a short period of time, which seems to contradict the claim that this plaintiff hit the wrong pedal. Nonetheless, if the plaintiff's attorney takes a cavalier attitude and ignores the issues – especially in a short-term event – he does so at his peril.



Booth

Larry Booth is a past president of CAALA and a past editor-in-chief of the Advocate. He graduated first in his class from USC Law School and was editor in chief of the Law Review. In 1973, he was selected to the Inner Circle of Advocates, a nationwide group of the 100 top trial lawyers in the

U.S. His firm, Booth & Koskoff in Torrance (www.boothkoskoff.com), has achieved over 75 million dollar plus verdicts and settlements, primarily in the fields of products liability and construction accidents and is currently representing plaintiffs in 10 separate accidents involving Toyotas, claiming design defects caused SUA.